

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

United States of America,  
  
Plaintiff,  
  
v.  
  
Darwin Rita-Luna,  
  
Defendant.

No. CR-24-03268-001-TUC-SHR (LCK)  
  
**Order Adopting R&R**

Pending before the Court is a Report and Recommendation (“R&R”) (Doc. 62) issued by United States Magistrate Judge Maria S. Aguilera recommending the Court deny Defendant’s Motion to Dismiss the Indictment (Doc. 19). Defendant has filed an Objection. (Doc. 65.) For the following reasons, the Court adopts the R&R over Defendant’s Objection.

**I. Background<sup>1</sup>**

The following summarizes the circumstances underlying this R&R:

Defendant, a native and citizen of Mexico, first entered the United States in 2008, when he was 17 years old. (Doc. 46 at 6–7, 14.) He lived in Tennessee with his uncle until October 2010, when he briefly returned to Mexico to visit his ailing mother. (*Id.* at 14–16.) In January 2011, he was apprehended by United States Border Patrol agents after crossing back

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<sup>1</sup> Neither party has objected to the Magistrate Judge’s findings of fact, and this Court adopts them herein.

1 illegally into Arizona. (*Id.* at 20–21.) He was placed in  
2 expedited removal proceedings and then deported to Mexico.  
3 (Pl.’s Ex. 3.)

4 Defendant has been deported from the United States several  
5 times since then, each time based on the 2011 order of removal.  
6 (Doc. 46 at 42–44.) He was apprehended in Arizona again in  
7 May 2024 and later indicted for illegal reentry. (Docs. 1, 8.) He  
8 filed a motion to dismiss, arguing that the 2011 removal order  
9 is constitutionally deficient and thus cannot serve as a predicate  
10 for his reentry charge. (Doc. 19.) The matter was set for an  
11 evidentiary hearing. (Docs. 30, 31, 38.)

12 At the hearing, the Government presented the testimony of  
13 Border Patrol Agent Nestor Espino, the agent who conducted  
14 Defendant’s expedited removal proceeding. Agent Espino did  
15 not recall his interaction with Defendant, so he testified about  
16 his routine practices for such proceedings. (Doc. 36 at 15.) He  
17 testified that he obtains an alien’s biographical information and  
18 fingerprints to determine whether the alien is already subject  
19 to an order of removal; if not, then he conducts an expedited  
20 removal. (*Id.* at 19.) He stated that he conducts the proceeding  
21 in the language specified in the forms, translates all  
22 information in each form, records the alien’s answers to  
23 questions verbatim, translates the answers back, gets  
24 supervisory approval, and gives the alien copies of the  
25 completed forms. (Doc. 36 at 26–42, 44–47; Doc. 37 at 10–13,  
26 24–25, 37–38, 77.)

27 Defendant testified at the hearing on his own behalf. He stated  
28 that Agent Espino asked him “simple” questions about his  
background, told him that he would be deported for five years,  
and directed him to sign certain forms. (Doc. 46 at 22, 28, 45.)  
However, he testified that Agent Espino never translated the  
forms, never read his answers back to him, and failed to give  
him copies of the forms. (*Id.* at 26–36.) He also testified that  
he was never given the opportunity to explain that the reason  
he left Mexico was to escape his physically abusive stepfather.  
(*Id.* at 33.) He says that his entire encounter with Agent Espino  
lasted no more than two to three minutes. (*Id.* at 22–23.)

(Doc. 62 at 1–2.) Defendant moved to dismiss the indictment charging him with illegal  
reentry, arguing various aspects of the 2011 expedited removal violated his due process

1 rights. (Doc. 19 at 8–12.) After conducting an evidentiary hearing, the Magistrate Judge  
2 issued her R&R, recommending the Court deny Defendant’s Motion to Dismiss because  
3 the underlying expedited removal was not fundamentally unfair. (*See generally* Doc. 62.)

4 Defendant filed an Objection and Motion for *De Novo* Review of the R&R (Doc.  
5 65), which contends the R&R errs in six ways: (1) in concluding Agent Espino’s failure to  
6 Obtain Defendant’s signature and initials pages of I-867AB did not amount to a due process  
7 violation; (2) in concluding Agent Espino’s failure to obtain Defendant’s signature on the  
8 I-860 form was not a due process violation; (3) by failing to address Agent Espino’s  
9 admission he did not consider Defendant for withdrawal of application for admission  
10 pursuant to the Inspector’s Field Manual; (4) in finding Agent Espino’s testimony was  
11 largely credible in light of contradictory statements; (5) in determining Defendant’s  
12 testimony was not credible; and (6) in concluding there were no plausible grounds for  
13 relief.

## 14 **II. Standard of Review**

15 When reviewing a magistrate judge’s R&R, this Court “may accept, reject, or  
16 modify, in whole or in part, the findings or recommendations made by the magistrate  
17 judge.” 28 U.S.C. § 636(b)(1). The Ninth Circuit has summarized the role of district  
18 courts in reviewing R&Rs as follows:

19 The magistrate judge system was designed to alleviate the  
20 workload of district courts. . . . To require a district court to  
21 consider evidence not previously presented to the magistrate  
22 judge would effectively nullify the magistrate judge's  
23 consideration of the matter and would not help to relieve the  
24 workload of the district court. Systemic efficiencies would be  
25 frustrated and the magistrate judge's role reduced to that of a  
26 mere dress rehearsal if a party were allowed to feint and weave  
27 at the initial hearing, and save its knockout punch for the  
28 second round. . . . Equally important, requiring the district  
court to hear evidence not previously presented to the  
magistrate judge might encourage sandbagging. [I]t would be  
fundamentally unfair to permit a litigant to set its case in  
motion before the magistrate, wait to see which way the wind  
was blowing, and—having received an unfavorable

1 recommendation—shift gears before the district judge.  
 2 *United States v. Howell*, 231 F.3d 615, 621–23 (9th Cir. 2000). Accordingly, “the district  
 3 judge must review the magistrate judge’s findings and recommendations de novo if  
 4 *objection is made*, but not otherwise.” *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121  
 5 (9th Cir. 2003) (en banc) (emphasis in original). However, objections to R&Rs “are not to  
 6 be construed as a second opportunity to present the arguments already considered by the  
 7 Magistrate Judge.” *Betancourt v. Ace Ins. Co. of Puerto Rico*, 313 F. Supp. 2d 32, 34  
 8 (D.P.R. 2004); *see also Camardo v. Gen. Motors Hourly-Rate Emps. Pension Plan*, 806 F.  
 9 Supp. 380, 382 (W.D.N.Y. 1992) (“The purpose of the Federal Magistrates Act is to relieve  
 10 courts of unnecessary work” and “[t]here is no increase in efficiency, and much extra work,  
 11 when a party attempts to relitigate every argument which it presented to the Magistrate  
 12 Judge.”).

### 13 **III. Relevant Law**

14 A person can be charged with illegal reentry if he or she “has been . . . deported, or  
 15 removed . . . and thereafter . . . enters, attempts to enter, or is at any time found in, the  
 16 United States.” 8 U.S.C. § 1326(a). When charged with violating § 1326, the defendant  
 17 has a right under the Due Process Clause of the Fifth Amendment to collaterally challenge  
 18 the removal order underlying the charge of illegal reentry. *United States v. Ubaldo-*  
 19 *Figuerroa*, 364 F.3d 1042, 1047–48 (9th Cir. 2004). Congress has codified this right and  
 20 its attendant conditions. *See* 8 U.S.C. § 1326(d).

21 To successfully mount a collateral attack under § 1326(d), the defendant must  
 22 demonstrate the following: (1) he or she “exhausted any administrative remedies” for relief  
 23 against the order; (2) the removal proceedings “improperly deprived the alien of the  
 24 opportunity for judicial review;” and (3) the order was “fundamentally unfair.” *Id.* “[E]ach  
 25 of the[se] statutory requirements . . . is [typically] mandatory.” *United States v. Palomar-*  
 26 *Santiago*, 593 U.S. 321, 329 (2021). However, the law does not provide for administrative  
 27 or judicial review of expedited removals of inadmissible arriving noncitizens unless a  
 28 noncitizen claims asylum or claims to be a legal permanent resident. 8 U.S.C.

1 § 1225(b)(1)(C); *see United States v. Barajas-Alvarado*, 655 F.3d 1077, 1081 (9th Cir.  
2 2011); *see also United States v. Raya-Vaca*, 771 F.3d 1195, 1202 (9th Cir. 2014) (finding  
3 defendant exhausted available administrative remedies and was deprived of judicial review  
4 in expedited removal proceeding with no opportunity for administrative or judicial review).  
5 Thus, the first two prongs are satisfied when a defendant did not claim asylum or claim to  
6 be a legal permanent resident and later challenges an expedited removal. *See United States*  
7 *v. Ochoa-Oregel*, 904 F.3d 682, 685 (9th Cir. 2018) (“An alien who had been removed  
8 through expedited removal proceedings automatically satisfies the requirements for  
9 exhaustion and deprivation of judicial review.”).

10 A removal order is fundamentally unfair if “(1) [a defendant’s] due process rights  
11 were violated by defects in the underlying deportation proceeding, and (2) he suffered  
12 prejudice as a result.” *Ubaldo-Figueroa*, 364 F.3d at 1048 (alteration in original) (citation  
13 omitted). A defendant need only show it was “plausible” he would not have been removed  
14 to demonstrate prejudice. *United States v. Muro-Inclan*, 249 F.3d 1180, 1184 (9th Cir.  
15 2001). In other words, a defendant must show he had “plausible grounds for relief from  
16 removal in the form of withdrawal of his application for admission” based on the  
17 Inspector’s Field Manual. *Raya-Vaca*, 771 F.3d at 1206. The Manual directs “officers to  
18 consider all relevant facts and circumstances,” including “(1) the seriousness of the  
19 immigration violation; (2) previous findings of inadmissibility against the alien; (3) intent  
20 on the part of the alien to violate the law; (4) ability to easily overcome the ground of  
21 inadmissibility; (5) age or poor health of the alien; and (6) other humanitarian or public  
22 interest considerations.” *United States v. Flores*, 901 F.3d 1150, 1162 (9th Cir. 2018)  
23 (citations omitted).

#### 24 **IV. Analysis**

25 Having conducted a de novo review,<sup>2</sup> the Court adopts the R&R’s reasoning and  
26 conclusion. Therefore, the Court will deny the Motion to Dismiss.

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27 <sup>2</sup> The Court has carefully reviewed the entire record, including but not limited to  
28 transcripts of the evidentiary hearing, the parties’ briefs, and evidence submitted to the  
Magistrate Judge. The Court has also reviewed the authorities cited by the parties and by  
the Magistrate Judge.

1           The first part of Defendant’s Objection addresses the Magistrate Judge’s due  
2 process analysis as it relates to two forms which lack Defendant’s signature or otherwise  
3 do not comply with the relevant regulations. (*See* Doc. 65 at 1–8.) Defendant asserts the  
4 Magistrate Judge erred in concluding Agent Espino’s failure to obtain Defendant’s  
5 signature and initials on each page of the Form I-867A did not amount to a due process  
6 violation. (*Id.* at 1.) The Magistrate Judge held, although Agent Espino may have violated  
7 8 C.F.R. § 235.3 by failing to have Defendant sign and initial each page of the Form I-  
8 867A, this regulatory violation did not rise to the level of a due process violation because  
9 the regulation did not, in and of itself, protect a person’s right to notice and an opportunity  
10 to respond. (Doc. 62 at 5–8.) The Magistrate Judge did not err in this conclusion.

11           Defendant contends the Magistrate Judge chose to rely on an unpublished Ninth  
12 Circuit case, *United States v. Mazariegos-Mazariegos*, No. 20-10316, 2022 WL 832071,  
13 at \*2 (9th Cir. 2022), instead of persuasive out of district, district court cases. (Doc. 65 at  
14 2–3.) Defendant notes those district court cases are “not binding on this Court,” but “the  
15 analyses contained in those decision[s] are much more in-depth and far better reasoned  
16 than *Mazariegos*.” (*Id.* at 2.) The Court’s role is to decide whether Agent Espino’s failures  
17 in this case deprived Defendant of notice and an opportunity to respond, *Raya-Vaca*, 771  
18 F.3d at 1204, not to decide whether an unpublished Ninth Circuit case or other district court  
19 cases are more analogous. The Magistrate Judge cited *Mazariegos* to supplement her  
20 analysis, not as the primary authority for her conclusion as to the Form I-867A. She  
21 primarily cited the rule from *Raya-Vaca* and analyzed how that rule applies to the  
22 regulation at issue, relying on *Mazariegos* only as supplemental support for her conclusion  
23 under the *Raya-Vaca* rule. (Doc. 62 at 8.) Because the Court agrees Agent Espino’s failure  
24 to obtain Defendant’s signature on the Form I-867A did not deprive Defendant of notice  
25 and an opportunity to respond<sup>3</sup>, this aspect of Defendant’s objection is legally insignificant.

26  
27           <sup>3</sup> In its response, the Government noted “8 U.S.C. § 235.3(b)(2) does not require an  
28 alien’s signature on both the I-867A and I-867B.” (Doc. 69 at 2 n.2.) Because the Court  
agrees with the Magistrate Judge’s assessment regarding the result, i.e. despite no signature  
on Defendant’s I-867A he was still afforded notice and an opportunity to respond, the Court  
will not decide the scope of the regulation de novo.

1           Next, Defendant asserts the Magistrate Judge erred in concluding Agent Espino's  
2 failure to obtain Defendant's signature on the I-860 form was not a due process violation.  
3 (Doc. 65 at 5.) The analysis regarding Form I-867A above and Form I-860 here are  
4 virtually the same, and "Defendant's own testimony indicates that he was advised of the  
5 charge." (Doc. 62 at 9.) Especially given Judge Aguilera's findings based on the testimony  
6 at the evidentiary hearing and the forms themselves, which the Court finds well supported  
7 by the record as detailed below, the Court concludes the failure to obtain a signature on the  
8 Form I-860 did not deprive Defendant of notice and an opportunity to be heard.

9           Contrary to Defendant's third assertion, Judge Aguilera did address Agent Espino's  
10 admission he did not consider Defendant for withdrawal of application for admission. (*See*  
11 Doc. 62 at 4–5; Doc. 65 at 8.) Defendant merely disagrees with the way Judge Aguilera  
12 addressed this admission and her conclusion regarding the import of this admission to the  
13 fundamental fairness analysis. Insofar as Defendant asserts Agent Espino's admission  
14 undermines Judge Aguilera's due process analysis, the Court finds this admission does not  
15 indicate Agent Espino deprived Defendant of an opportunity to respond by failing to  
16 inquire more about the factors which may have supported withdrawal of application for  
17 admission. Agent Espino's admission did not indicate he prevented or blocked Defendant  
18 from volunteering the information necessary to assess Defendant's unique facts and  
19 circumstances. Due process does not require an agent to read the mind of the defendant  
20 and inquire regarding all relevant facts and circumstances. Only an opportunity to respond  
21 is required.

22           Regarding the prejudice prong, Defendant seems to assert Agent Espino's admission  
23 renders prejudice a foregone conclusion. (*See* Doc. 65 at 10–11.) Not so. Despite his  
24 admission, the bulk of Agent Espino's testimony indicates he provided Defendant ample  
25 opportunity to raise grounds for relief, despite his belief (flawed or not) that such relief was  
26 not being offered to any applicants for admission at the time. Just because Agent Espino's  
27 testimony establishes he perceived there to be a zero-tolerance policy at the time such that  
28 he could not consider Defendant for withdrawal of admission does not mean, if Agent



1 Espino were under a different impression, Defendant would have a more plausible case for  
2 relief. In fact, as noted by Judge Aguilera, the Inspector's Field Manual explains  
3 "'workload' can be a 'less significant' factor in determining whether to grant relief." (Doc.  
4 62 at 13 (quoting Def.'s Ex. 30 at 1).) Therefore, Judge Aguilera appropriately found this  
5 admission comports with the Manual's guidance on reduced plausibility of relief when  
6 agents are tasked with responding to surges in applicants for admission and the agents'  
7 increased workload.

8 Defendant asserts Judge Aguilera erroneously found Agent Espino's testimony was  
9 largely credible despite some contradictory or confounding statements. (Doc. 65 at 11–  
10 12.) The Court finds Judge Aguilera properly accounted for Agent Espino's contradictions.  
11 Judge Aguilera acknowledged "issues" with Agent Espino's testimony, noting he appeared  
12 unsure about certain aspects of the law, but found, consistent with Defendant's own  
13 testimony, Agent Espino's testimony regarding how he conducts expedited removal  
14 proceedings credible. (Doc. 62 at 5.) Notably, none of the inconsistencies Defendant  
15 points out render the Magistrate Judge's findings incorrect.

16 Similarly, Judge Aguilera did not err in determining Defendant's testimony was  
17 largely not credible. Defendant mainly objects to this finding because he suggests Agent  
18 Espino had more inconsistencies in his testimony and more motive to testify in his personal  
19 interest than Defendant. (*See* Doc. 65 at 17–20.) However, the Court on its de novo review  
20 concurs with Judge Aguilera's credibility findings. The Magistrate Judge found Defendant  
21 "plainly had a motive to misrepresent what occurred," and pointed out inconsistencies in  
22 Defendant's testimony. (Doc. 62 at 4.) Defendant asserts, given Agent Espino's failure to  
23 follow the regulations, "he similarly had a plain motive to misrepresent what occurred."  
24 (Doc. 65 at 19.) Yet the Court finds this assertion lacks plausibility because what is at  
25 stake for each testifying witness is vastly different. The Court finds Defendant's attempt  
26 to analogize the motive to lie for a Defendant facing criminal penalties to that of a person  
27 who may have made a legally insignificant mistake in filling out paperwork 14 years ago  
28 not compelling, especially when no clear repercussions for any such failure were elicited



1 in Agent Espino's testimony. The Court also agrees with Judge Aguilera's finding  
2 Defendant "avoided answering straightforward questions about whether a certain form was  
3 filled out at the time he signed it" and Defendant's testimony overall lacked plausibility.  
4 (Doc. 62 at 4.) The credibility analysis performed by the Magistrate Judge was not  
5 fundamentally flawed.

6 Lastly, the Court finds the Magistrate Judge did not err in concluding there were no  
7 plausible grounds for relief. Defendant argues the Magistrate Judge "simply and  
8 completely ignored the one dispositive factor"—"between October 30, 2010 and April 8,  
9 2011, both before and after the challenged expedited removal, Border Patrol had itself  
10 decided [Defendant's] circumstances warranted relief, twice granting him voluntary  
11 return." (Doc. 65 at 20.) Upon a de novo review, the Court determines the relief offered  
12 prior to and after the challenged expedited removal is not dispositive of prejudice. Even  
13 assuming the six-factor test weighed in his favor, Defendant still could have been denied  
14 relief based on the more minor factor of workload, as noted above. And, this relief is  
15 ultimately discretionary, so even then Defendant may still not have been offered relief  
16 depending on the circumstances at an exact moment in time. Therefore, the fact Defendant  
17 asserts is "dispositive" is not, and it was appropriate for the Magistrate Judge to account  
18 for it as she did.

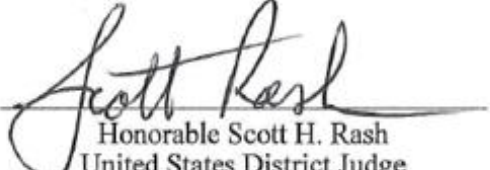
19 Based on the forgoing analysis, the Court finds the underlying expedited removal  
20 did not violate Defendant's due process rights, and, even if it had, Defendant did not suffer  
21 prejudice as a result.

22 **V. Conclusion**

23 **IT IS ORDERED** the Report & Recommendation (Doc. 62) is **ADOPTED**.

24 **IT IS FURTHER ORDERED** the Motion to Dismiss (Doc. 19) is **DENIED**.

25 Dated this 15th day of August, 2025.

26   
27 Honorable Scott H. Rash  
28 United States District Judge